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IN THE

Supreme Court of the United States

OCTOBER TERM 1939.

No. [redacted] 69

RECONSTRUCTION FINANCE CORPORATION, PRUDENCE BONDS CORPORATION, PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, and THE MARINE MIDLAND TRUST COMPANY OF NEW YORK,

Petitioners,

vs.

PRUDENCE SECURITIES ADVISORY GROUP, INDEPENDENT PRUDENCE BONDHOLDERS COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION SUBMITTED ON BEHALF OF RESPONDENTS PRUDENCE SECURITIES ADVISORY GROUP, PERCIVAL E. JACKSON AND CLINTON T. ROE, ITS COUNSEL, GEORGE M. JAFFIN AND LEONARD KLABER AND SAMUEL SILBIGER.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1939.

No. 992.

RECONSTRUCTION FINANCE CORPORATION, PRUDENCE BONDS CORPORATION, PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, and THE MARINE MIDLAND TRUST COMPANY OF NEW YORK,

Petitioners,

vs.

PRUDENCE SECURITIES ADVISORY GROUP, INDEPENDENT PRUDENCE BONDHOLDERS COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION SUBMITTED ON BEHALF OF RESPONDENTS PRUDENCE SECURITIES ADVISORY GROUP, PERCIVAL E. JACKSON AND CLINTON T. ROE, ITS COUNSEL, GEORGE M. JAFFIN AND LEONARD KLABER AND SAMUEL SILBIGER.

Opinions Below.

The opinions of the Circuit Court of Appeals for the Second Circuit (R. 319-328)[1] are not yet officially reported.

Jurisdiction.

The decree of the Circuit Court of Appeals dismissing petitioners' appeals was entered April 23, 1940 (R. 330-337). The petition for writ of certiorari was filed May

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[1] All record references herein are to pages of the proposed record.

8th, 1940. The jurisdiction of this Court is invoked under Section 24 (c) of the Bankruptcy Act and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Petitioners filed with the District Court notices of appeal from orders of the District Court making allowances of compensation and reimbursement. Other appellants below filed with the District Court notices of appeal from orders refusing to make allowances of compensation or reimbursement. In no case was application made to the Circuit Court of Appeals for leave to appeal, and in no case was such leave obtained from the appellate court.

The question presented is whether the Circuit Court properly dismissed the appeals by reason of the failure of the appellants to apply for and obtain leave to appeal from said Court within the statutory period. The petitioners divide this question into three parts.[2]

In the argument hereafter, we discuss the subdivisions of the question as presented by the petitioners.[3]

Statute Involved.

The pertinent statute involved is the Bankruptcy Act, as amended June 22nd, 1938, Sections 25 and 250 which are set forth in Appendix A.

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[2] Petition for Writ—pp. 2, 3.

[3] Petitioners have indicated that if a writ were granted they would argue the additional question whether the order consolidating the appeals gave the Circuit Court of Appeals jurisdiction over certain of them. The fact is that at no time was an application for leave to appeal made to the Circuit Court, and that Court has refused to consider the application for consolidation as such an application (R. 325).

Statement.

This proceeding has been pending since 1934 and involves eighteen separate plans and one general plan of reorganization for eighteen series of outstanding bonds aggregating over $50,000,000, each series being secured by a separate indenture and having a separate trustee.[4]

After the confirmation of the plans of reorganization, the Special Master reported to the District Court on allowances to various parties. These reports were confirmed by the District Judge with modifications. The allowances fell in two categories, first, for reorganization expenses, and second, for administration expenses, the latter including both the administrative cost of "servicing" mortgages and real property[5] and the contractual obligations of the debtor to the various corporate trustees and their counsel under the eighteen indentures securing the eighteen series of bonds.[6]

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[4] See *In re Prudence Bonds Corporation—Appeal of Chemical Bank & Trust Co.* (C. C. A. 2), 79 F. (2d) 205, cert. den. 296 U. S. 652.

[5] This was the business of the debtor (see *In re The Prudence Company Inc.* (C. C. A. 2), 82 F. (2d) 755).

[6] "It must also be clearly understood, as is plainly set forth by the Special Master in his reports, that the allowances to the corporate trustees and their attorneys are mainly based on entirely different ground from that on which is based these allowances to attorneys and committees. The latter are for services strictly within the reorganization expense. The former relate mainly to the ordinary contractual relations of servicing agents, etc., which were a part of a going concern.

"In my opinion the total allowances now under consideration recommended by the Special Master and by this court for strictly reorganization expenses in a matter of this magnitude and complexity and with the numerous parties in interest and the many incidental proceedings and appeals, is exceedingly reasonable." (Opinion of Hon. Robert A. Inch, Judge of the United States District Court, Eastern District of New York, dated March 15, 1939, *In re Prudence Bonds Corporation,* E. D. N. Y. Index No. 26545, unreported.)

Petitioners herein and others sought to take appeal to the Circuit Court of Appeals for the Second Circuit (R. 92-161, 189, 207-222) from the orders of the District Court making, denying or deferring payment of allowances herein.

Of the various appellants, ten sought allowances which the District Judge had denied *in toto* (R. 142, 145, 147, 153, 158), sixteen sought increased allowances (R. 146, 159-161, 209-222), while two appealed from all allowances made, claiming, *inter alia* and principally, that the aggregate was excessive.[7] These latter two appellants, Prudence-Bonds Corporation (New Corporation) and Reconstruction Finance Corporation are two of the four petitioners herein; the other two petitioners, President and directors of the Manhattan Company and The Marine Midland Trust Company of New York are appellants who did not appeal from the orders making allowances to respondents but sought solely to increase their own allowances (R. 216, 221).

In attempting to appeal to the Circuit Court of Appeals, none of the appellants sought or obtained leave of that Court (R. 320).

Thereafter, on the basis of the opinion of the Seventh Circuit Court of Appeals (*In re Albert Dickinson Co.*, 104 F. (2d) 771), respondents, Prudence Securities Advisory Group, and its attorneys, moved to dismiss the appeals

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[7] These appeals were taken in two groups; the first group was consolidated by order of the Circuit Court of Appeals dated March 22, 1939 (R. 252), which was made after the time to appeal from the order making allowances to Prudence Securities Advisory Group and its attorneys had expired, and which order provided, *inter alia*, that it was made "without prejudice to a motion to dismiss said appeals" (R. 252). The second group was independently consolidated (but not with those of the first group) by order dated January 8, 1940, on a petition verified January 2, 1940 (R. 280) more than forty days after the entry of the order appealed from (R. 293).

of petitioners, Prudence-Bonds Corporation (New Corporation) and Reconstruction Finance Corporation, these being the only appeals which had been directed to the order granting allowances to said respondents (R. 276-279). The Circuit Court of Appeals for the Second Circuit, adhering to its decision in *London* v. *O'Dougherty*, 102 F. (2d) 524, denied the motion by order made December 7, 1939 (R. 279).

Respondents, Prudence Securities Advisory Group, and its attorneys, then moved for an extension of their time to petition this Court for a writ of certiorari in order that the conflict between the decision of the Second Circuit in *London* v. *O'Dougherty* and that of the Seventh Circuit in *Re Albert Dickinson* might be settled. On the hearing of that motion, the petitioners, Prudence-Bonds Corporation (New Corporation) and Reconstruction Finance Corporation submitted a brief on the main question then pending before this Court in *Dickinson Industrial Site, Inc.* v. *Cowan.*

Thereafter, this Court resolved the conflict in favor of the contention of these respondents by affirming the decision of the Seventh Circuit (*Dickinson Industrial Site, Inc.* v. *Cowan*, 60 S. Ct. 595, 84 L. Ed. 549).[8]

As a result, it became unnecessary for respondent, Prudence Securities Advisory Group, and its attorneys, to seek certiorari in the instant case. Instead, they moved for reargument of their motion to dismiss the appeals (R. 287-294). The respondents, Independent Prudence Bondholders Protective Committee, and its counsel, likewise moved to dismiss the appeals directed to their allowances (R. 294-300). The Circuit Court, upon the opinion of this Court affirming the determination of the Seventh Circuit in the *Dickinson* case and overruling

[8] Hereinafter referred to as the "Dickinson case".

that of the Second Circuit in *London* v. *O'Dougherty*, granted these motions and dismissed all appeals (R. 326).[9]

Argument.

On the foregoing state of facts, respondents submit that the decision of this Court in *Dickinson Industrial Site, Inc.* v. *Cowan, supra,* resolved the conflict heretofore existing, stated in unmistakable language the rule applicable to the instant case, and thereby made the issuance of a writ of certiorari herein wholly unnecessary.

The three questions urged by the petitioners furnish no basis for the issuance of a writ.

I.

Petitioners' First Question: Was the failure to apply to the Court below for leave within the appeal period a jurisdictional defect requiring the dismissal of the appeals?

The answer to this question can only be in the affirmative.

This Court has just held in the *Dickinson* case that "appeals from all orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals" (p. 551).

It has repeatedly been held by this Court that where an appeal may be taken only by leave of the appellate court, failure to apply for such leave within the appeal

[9] The Court of its own motion heard argument as to and dismissed all of the other appeals (R. 326).

period is a jurisdictional defect requiring dismissal of the appeal. *Shulman* v. *Wilson Sheridan Hotel Co.*, 301 U. S. 172; *Meyer* v. *Kenmore Granville Hotel Co.*, 297 U. S. 160; *McCrone* v. *United States*, 307 U. S. 61; *Alaska Packers Asso.* v. *Pillsbury*, 301 U. S. 174.

There is no conflict in the application of this rule. Every Circuit Court of Appeals has adopted it.[10]

Petitioners point to two cases in the Fifth Circuit (*Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404 and *Wilson* v. *Alliance Life Ins. Co.*, 102 F. (2d) 365). But as Judge Swan pointed out in his opinion in the instant case, not only do these cases contain no consideration of the problem, but they do not refer to the Fifth Circuit's own adherence to the general rule in *Shoreland Co.* v. *Conklin*, 30 F. (2d) 489 (R. 323), or to the decisions of every other Circuit Court of Appeals. Furthermore, these two cases are squarely contrary to the decisions of this Court in the cases of *Shulman* v. *Wilson-Sheridan Hotel Co.* and *McCrone* v. *United States, supra*, where this Court passed upon the matter as to which there is now a claim of conflict. The uniformity of these decisions renders any claim of conflict based on the Fifth Circuit decisions illusory, and renders wholly unnecessary the issuance of a writ in a case decided in conformity therewith.

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[10] The cases from each Circuit Court of Appeals are cited in Appendix B. Four of them were cited by this Court with approval in *Meyer* v. *Kenmore-Granville Hotel Co., supra*, and one of them cited with approval in *Shulman* v. *Wilson-Sheridan Co., supra;* and in seven of them, certiorari to review the decision of dismissal was denied.

II.

Petitioners' Second Question: Was the Court below compelled, under Section 250 of the Bankruptcy Act, to dismiss the appeals because application for leave to appeal was not made within the appeal period?

Petitioners' second question is not distinguishable from their first. Apparently petitioners are urging that though an application for leave to appeal is jurisdictional, failure to make such an application within the statutory period is not jurisdictional.

The time within which appeals may be taken to and allowed by the Circuit Court is fixed by statute.[11] Since the statute fixes the period, it is settled that the time may not be extended either by the court or by consent of the parties. *Old Nick Williams Co.* v. *United States*, 215 U. S. 541; *Vaughan* v. *American Insurance Co. of Newark, N. J.* (C. C. A. 5), 15 F. (2d) 526, 527.

Indeed, every case we have cited under our discussion of the first question is determinative of petitioners' second one. For, in holding that it must dismiss an appeal for lack of an application for leave, each Court necessarily decided that it was too late to apply for and obtain such leave after the statutory period for appeal had expired.

Petitioners urge that a different result should now obtain because of Rule 73 (a) of the Rules of Civil Procedure.

This contention has been answered by the *Dickinson* case, *supra*.[12] The very ground urged for dismissal in

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[11] Sections 250 and 25 of the Bankruptcy Act, as amended.

[12] On this score see also:

In re Albert Dickinson Co., 104 F. (2d) 771, 774;
In re Donahoe's Inc. (C. C. A. 3), 110 F. (2d) 813;
Coursey v. *International Harvester Co.* (C. C. A. 10), 109 F. (2d) 774.

the *Dickinson* case was the failure to comply with the mandate of Rule 73 (a) that a notice of appeal be filed in the District Court "when an appeal is permitted by law". Had the rule applied, the Court would have dismissed that appeal.

Petitioners also rely on *Taylor* v. *Voss*, 271 U. S. 176. The same case was relied upon by the appellants in *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* and rejected there, for this Court affirmed the order of the Circuit Court dismissing the appeal for lack of jurisdiction because leave to appeal had not been obtained.

The difference between the *Taylor* case, on the one hand, and the *Dickinson* and instant cases, on the other, is inescapable.

The *Taylor* case held that, under the then prevailing statute, a petition to revise *was a concurrent remedy* with an appeal where a review as to matters of law was all that was sought from a determination in a controversy in a bankruptcy proceeding.

The *Dickinson* case holds that an appeal under Section 250 *is the only method of review* in an appeal from allowances.

Moreover, in the *Taylor* case, both methods of review were taken as of right.[13] To apply the holding of the *Taylor* case here would mean that an appeal as of right under Section 24 (a) is a concurrent remedy to review allowances with an appeal only by leave of the appellate court under Section 250. This is exactly contrary to what this Court held in the *Dickinson* case, and by this argument the requirement of the statute that leave must be obtained from the appellate court in its discretion in an appeal from allowances could be avoided by taking the appeal under Section 24 (a).

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[13] See *In re Perlman* (C. C. A. 7), 68 F. (2d) 729, 730.

III.

Petitioners' Third Question: Was the Court below compelled to give retroactive effect to the subsequent decision of this Court and to dismiss the appeals for want of jurisdiction?

It is difficult to see how the answer to this question can admit of doubt. Petitioners argue that since they relied upon *London* v. *O'Dougherty*, the respondents are bound by that decision notwithstanding the holding by this Court that the *London* case was erroneous.

Such a contention violates elementary principles of appellate jurisdiction.

Cases relied upon by petitioners where the Court of last resort reverses itself have no application,[14] where as here, this Court has not reversed itself but in construing for the first time the applicable statute has resolved a conflict between inferior courts by stating the true rule.

"We will not help out the man who has trusted in the judgment of some inferior court. In his case, the chance of miscalculation is felt to be a fair risk of the game of life, not different in degree from the risk of any other misconception of right or duty. He knows that he has taken a chance, which caution often might have avoided. The judgment of a court of final appeal is felt to stand upon a different basis."

Cardozo, The Nature of the Judicial Process, pp. 147-148.

"Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have

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[14] *Chicot County District* v. *Bank*, 308 U. S. 371, is also quoted for this retroactive exception, though it involved solely an attempt to attack collaterally a prior judgment on jurisdictional grounds.

had to assume the risk that the ultimate interpretation by the highest court might differ from its own." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 682.

To the same effect see *Sears Roebuck & Co.* v. *9 Ave.-31st St. Corp.*, 274 N. Y. 388, 400, 401; *Evans* v. *Supreme Council, Royal Arcanum*, 223 N. Y. 497, 503.

It is to be remembered that respondents, Prudence Securities Advisory Group and its counsel, obtained extension of their time to apply for a writ when their prior motion to dismiss was denied below. The holding by this Court in the *Dickinson* case might have first been made in this case had not that appeal been pressed. If petitioners are correct and respondents herein are not entitled to the true rule under the present circumstances, then it must follow logically that respondents could not have benefitted if the *Dickinson* ruling had been made on their appeal, for the petitioners' reliance on the *London* v. *O'Dougherty* case would have been just as great had this Court written the correct rule on the appeal of these respondents.

But such a conclusion would deprive this Court of a large part of its appellate jurisdiction and would constitute an unwarranted extension of the principle of *res judicata*. An appeal would then be fruitless so long as there was a prior erroneous decision below, for this Court could only then state the rule for the future while denying appellants' present relief. Petitioners seek to bind respondents by the erroneous decision of *London* v. *O'Dougherty* to which respondents were not parties and upon which they could not be heard. This petitioners cannot do. *Sears Roebuck & Co.* v. *9 Ave.-31 St. Corp.*, *supra*.

The Circuit Courts are required to apply the holding of this Court in the *Dickinson* case to all pending proceedings. This they have uniformly done. (*In re Donahoe's* (C. C. A. 3), 110 F. (2d) 813; and *Milbank, Tweed & Hope, et al.* v. *McCue, et al.* (C. C. A. 4) (No. 4585, unreported.) As to this elementary principle, there is and can be no conflict.

CONCLUSION.

We submit that there is no reason for granting a writ of certiorari in this case. There is nothing novel or important in the decision of the Court below, which correctly applies principles well established by this Court.

Respectfully submitted,

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Appendix A.

The Bankruptcy Act, as amended by the Act of June 22, 1938 (c. 575, 52 Stat. 840; 11 U. S. C. Supp. V, Secs. 48 and 650):

Sec. 25. Practice on Appeals.— a. Appeals under this Act to the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which service shall be filed within five days after service or, if such notice be not served and filed, then forty days from such entry.

* * * * * * * * *

Sec. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

Appendix B.

LIST OF BANKRUPTCY CASES OF THE VARIOUS CIRCUIT COURTS OF APPEAL HOLDING FAILURE TO APPLY FOR LEAVE WITHIN STATUTORY PERIOD IS JURISDICTIONAL AND REQUIRES DISMISSAL OF THE APPEALS.

First Circuit.

Ahlstrom v. *Ferguson*, 29 F. (2) 515;
Yglesias & Co. v. *Eneglotaria Medicine Co. Inc.*, 73 F. (2) 485, Pet. for reh. den. 74 F. (2) 635, cert. den. 295 U. S. 739;
Gorbea v. *Soto Gras*, 82 F. (2) 634.

Second Circuit.

In re Torgovnick, 49 F. (2) 211;
In re Federal Photo Engraving Corp., 54 F. (2) 628;
In re Weinstock, 56 F. (2) 829;
In re Books, 72 F. (2) 363;
In re Roe, 87 F. (2) 693;
In re Combs, 88 F. (2) 417, cert. den. 302 U. S. 683;
In re C. M. Piece Dyeing Co., 89 F. (2) 37;
In re Postal Telegraph & Cable Corp., 89 F. (2) 183;
In re Connecticut Co., 95 F. (2) 311, cert. den. 304 U. S. 571.

Third Circuit.

Jurgenson v. *National Oil & Supply Co.*, 63 F. (2) 727;
Stein v. *Gaetje*, 96 F. (2) 877;
Noble v. *Hopewell Nat. Bank*, 98 F. (2) 623.

Fourth Circuit.

Wingert v. *Smead*, 70 F. (2) 351, cert. den. 293 U. S. 567.

Fifth Circuit.

Shoreland Co. v. *Conklin,* 30 F. (2) 489.

Sixth Circuit.

Deeley v. *Cincinnati Art Pub. Co.,* 23 F. (2) 920;
Humber v. *Bankers' Trust Co.,* 70 F. (2) 265;
Capital Endowment Co. v. *Kroeger,* 86 F. (2) 976.

Seventh Circuit.

In re Perlman, 68 F. (2) 729;
In re Johanson, 77 F. (2) 204;
In re Wilson-Sheridan Hotel Co., 86 F. (2) 898, aff'd 301 U. S. 172;
In re Kenmore Granville Hotel Co., 90 F. (2) 151;
In re Glen Sheridan Realty Trust, 90 F. (2) 466, cert. den. 302 U. S. 727;
In re Grocery Center, Inc., 91 F. (2) 176, cert. den. 302 U. S. 727;
In re Fearheiley, 97 F. (2) 231.

Eighth Circuit.

Broders v. *Lage,* 25 F. (2) 288;
Stanley's Incorporated Store No. 3 v. *Earl,* 25 F. (2) 458, cert. den. 278 U. S. 637;
Raich v. *Olson,* 25 F. (2) 865;
American State Bank v. *Ullrich,* 28 F. (2) 753;
Gate City Clay Co. v. *Dickey,* 39 F. (2) 581;
Schnurr v. *Miller,* 49 F. (2) 109;
Hunter v. *Commerce Trust Co.,* 55 F. (2) 1;
In re Schulte-United, Inc., 59 F. (2) 553;
Hudspeth v. *Woods,* 70 F. (2) 504;
Vitagraph, Inc. v. *St. Louis Properties Corp.,* 77 F. (2) 590;

Credit Alliance Corp. v. *Atlantic, Pacific & Gulf R. Co.*, 77 F. (2) 595;
St. Louis Can Co. v. *General American Life Ins. Co.*, 77 F. (2) 598;
Hey v. *Ward*, 84 F. (2) 193;
Griffith v. *Equitable Life Assurance Society*, 91 F. (2) 9;
Schoppe v. *First Trust Co.*, 101 F. (2) 417.

Ninth Circuit.

Standard Sanitary Mfg. Co. v. *Momsen-Dunnegan-Ryan*, 51 F. (2) 684;
In re Miller & Harbaugh, 56 F. (2) 141;
In re Interstate Oil Corp., 63 F. (2) 674;
Wilkerson v. *Cooch*, 78 F. (2) 311;
Robinson v. *Edler*, 78 F. (2) 817;
In re Harris, 78 F. (2) 849;
Raentsch v. *American Co.*, 82 F. (2) 770;
Bank of America Nat. Trust & Savings Assn. v. *Cuccia*, 90 F. (2) 100;
Harrison Securities Co. v. *Spinks Realty Co.*, 92 F. (2) 904;
In re National Finance & Mortgage Corp., 96 F. (2) 74.

Tenth Circuit.

In re Merchants' Oil Co., 36 F. (2) 655;
Quarles v. *Dennison*, 45 F. (2) 585;
Mason v. *Hardy-Griffin-Sheff*, 45 F. (2) 587;
Marcy v. *Miller*, 95 F. (2) 611.

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